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No. 84-338

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

A & P STEEL, INC.,

Petitioner,

vs

ROSEBUD SIOUX TRIBE,

Respondent.

On Writ of Certiorari to the United States Court Of Appeals For The Eighth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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EDITOR'S NOTE

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

An accurate statement of the case can be found in Rosebud Sioux Tribe v. A & P Steel, Inc., 733 F.2d 509 (8th Cir. 1984) at 511.

REASONS THE WRIT OF CERTIORARI SHOULD BE DENIED

1. The Eighth Circuit Court of Appeals correctly ruled that, as a matter of law, there is no agency issue to submit to the jury. The Eighth Circuit's decision complies with South Dakota substantive law that holds in cases of fraud a purpose to benefit the corporation is necessary to bring the agent's acts within the scope of employment.

2. Under the unique facts of the present civil case, if Lone Dog is allowed to assert his Fifth Amendment privilege against self-incrimination upon retrial, it should be asserted in the jury's presence. This will allow the Tribe to draw logical inferences therefrom against Lone Dog's co-conspirator, A & P Steel, Inc. The decision of the Eighth Circuit Court of

Appeals to this effect does not conflict with the decisions of this Court, nor is there a conflict among the circuits.

ARGUMENTS AND AUTHORITIES

I. Since it was undisputed that agents of a corporation were acting for the benefit of the corporation, it was erroneous, as a matter of law, to present to the jury the factual issue of agency.

In its Petition for Writ of Certiorari, A & P Steel, Inc. claims that the Eighth Circuit Court of Appeals created federal common law to the effect that a corporate defendant is strictly liable for the fraudulent acts of its agents, even though the corporation had no knowledge of the act as and the agent was acting for an independent personal benefit, adversely to the interest of the corporation. This claim distorts the Eighth Circuit's decision and is incorrect.

What the Eighth Circuit Court did hold is that since it was undisputed that Strain and McPherson were acting as agents of A & P Steel, Inc., and not for their own independent purposes, it was erroneous, as a matter of law, to present the issue to the jury by way of the agency instruction that was given. It is clear that the Eighth Circuit Court of Appeals believed Instruction No. 10 was clearly erroneous under the facts of this case, and not as a general statement of law. Indeed, the following quotes from the Eighth Circuit Court of Appeals demonstrate this conclusion beyond any doubt.

> "One of the bases supporting the trial court's denial of the 60(b) motion was the possibility that the jury may have determined that, if fraud and bribery occurred, Strain, Lone Dog, Driving Hawk, and McPherson were acting for their own independent purposes and not as agents of A & P." Rosebud Sioux

Tribe v. A & P Steel, Inc., 733 F.2d 509, (8th Cir. 1984) at 517.

> "It is undisputed that A & P, not McPherson in his personal capacity, hired Attorney Strain as a 'consultant' on the irrigation project. Further, Pearce, as president of A & P, was aware that Strain had been hired. Finally, the money Strain received from his involvement with the project came from A & P out of corporation funds - not out of McPherson's pocket. It is clear, as a matter of law, that Strain and McPherson were acting as agents of A & P and not for their own independent purposes." Id., 518.

The Eighth Circuit Court of Appeals did not hold that Instruction No. 10 was an incorrect statement of the law; nor did they create federal common law to the effect that a corporate defendant is strictly liable for the fraud of a corporate agent acting adversely to the corporate interest and for his own independent profit. They simply held that under the undisputed facts of this

case, it was erroneous, as a matter of law, to give Instruction No. 10.

The Eighth Circuit's decision does comply with South Dakota substantive law that holds in cases of fraud a purpose to benefit the corporation is necessary to bring the agent's acts within the scope of employment. Bourk v. Iseman Mobile Homes, Etc., 316 N.W.2d 343 (S.D. 1982); Burke v. Thomas Chevrolet, 227 N.W.2d 31 (S.D. 1975); and Rasmussen v. Reedy, 84 N.W. 205 (S.D. 1900). Why would A & P pay the Tribe's lawyer (Strain) over $173,000.00 if it wasn't for a purpose to benefit the corporation? The Eighth Circuit correctly ruled that as a matter of law, there is no agency issue to submit to the jury. Its decision is correct and reasonable.

II. An adverse inference may be drawn against a corporation

> when its co-conspirator invokes his Fifth Amendment privilege against self-incrimination in a civil case.

A & P Steel, Inc., in its Petition for Writ of Certiorari, has asserted that the Eighth Circuit Court of Appeals has extended Baxter v. Palmigiano, 425 U.S. 308, 47 L.Ed.2d 810, 96 S.Ct. 1551 (1976), beyond its holding and created a conflict with Namet v. United States, 373 U.S. 179, 10 L.Ed.2d 278, 83 S.Ct. 1151 (1963), other decisions of federal courts of appeal, and common law.

A & P Steel, Inc. requests this Court to hold that a party should not be permitted to draw an adverse inference against a corporate party based on a non-party witness' invocation of his Fifth Amendment privilege against self-incrimination.

The Eight Circuit Court of Appeals held:

". . . that given the circumstances presented in this case, the Tribe should have been allowed to call Lone Dog as a witness." Rosebud Sioux Tribe v. A & P Steel, Inc., 733 F.2d 509 at 523 (8th Cir. 1984).

The holding in Rosebud, Id., was limited to its facts. The Eighth Circuit at 522 summarized the facts as follows:

"Lone Dog was a principal actor in a situation fraught with fraud. He was involved in an alleged, triangular conspiracy between A & P Strain, and officers of the Tribe. There is a more significant consideration, however. Even though it was the Tribe which initially called Lone Dog as a witness, Lone Dog was really A & P's witness. By introducing into evidence Lone Dog's favorable deposition testimony, A & P made Lone Dog its principal witness and, simultaneously, effectively precluded the opportunity for cross-examination. Further, even though the grand jury testimony has increased the likelihood that the deposition testimony was perjured, from the court's point of view the evidence presented at trial by the Tribe was sufficient to cast considerable doubt on the truth of Lone Dog's deposition. Yet the evidence, by itself, could not have overcome the

> weight or significance the deposition testimony would have had with the jury. Once the deposition was allowed into evidence, it was necessary to allow the Tribe to call Lone Dog as a witness in order to offset the unfair advantage A & P gained by being allowed to use the deposition."

The Eighth Circuit Court of Appeals, in the interests of justice, in extending Baxter, supra, to a civil case involving a co-conspirator's assertion of the privilege against self-incrimination, as opposed to a party's assertion of the privilege, acted in accordance with Federal Rule of Evidence 501 and Trammel v. United States, 445 U.S. 40, 63 L.Ed.2d 186, 100 S.Ct. 906 (1980), in developing the law on a case by case basis.

However, the issue is probably moot since Lone Dog has been given immunity and has subsequently testified.

Prior to trial, on June 16, 1980, the Tribe took Lone Dog's discovery deposition.

Lone Dog, at trial on October 2, 1981, in chambers, exercised his right against self-incrimination.

On September 18, 1981, Lone Dog testified before the federal grand jury at Sioux Falls, South Dakota.

On November 2, 1982, in the United States District Court for the District of South Dakota, Central Division, Pierre, South Dakota, Richard Lone Dog testified in the criminal trial of United States v. Michael Strain, CR. 82-30055-01. A 76-page transcript of his testimony shows that he was carefully advised of his privilege against self-incrimination and that he waived the privilege.

Prior to trial, on June 16, 1980, the Tribe took Bone Dog's discovery deposition.

Bone Dog, at trial on October 2, 1981, in chambers, exercised his right against self-incrimination.

On September 15, 1981, Bone Dog testified before the Federal grand jury at Sioux Falls, South Dakota.

On November 3, 1982, in the United States District Court for the District of South Dakota, Central Division, Pierre, South Dakota, Richard Bone Dog testified in the criminal trial of United States v. Michael Eagle, CR. 82-30053-01. A Tribe-page transcript of his testimony shows that he was correctly advised of his privilege against self-incrimination and that he waived the privilege.

It is granted that most federal courts which have decided the waiver issue have held that a witness' sworn evidence in one proceeding as to matters which tend to incriminate him does not constitute a waiver of the witness' right to invoke the Fifth Amendment privilege against self-incrimination as to the same matter in a separate independent court proceeding. See 42 A.L.R Fed. 793, Right of Witness. In Federal Court To Claim Privilege Against Self-Incrimination After Giving Sworn Evidence On Same Matter In Other Proceedings. At least one case has ruled that a witness' sworn evidence in a prior proceeding is a waiver of the witness' right to plead the Fifth Amendment privilege against self-incrimination in a subsequent proceeding as to matters concerning

which the witness previously gave evidence. Ellis v. United States, (1969) 135 App. D.C. 35, 416 F.2d 791.

Since Lone Dog has been given immunity, he has probably waived his privilege against self-incrimination, and he won't be able to invoke the privilege at a new trial. Thus, the issue of whether or not an adverse inference can be based on a non-party witness' invocation of his Fifth Amendment privilege is moot. IT is a black letter principle that the federal tribunals are without power to decide questions that cannot affect the rights of litigants in the case before them. North Carolina v. Rice, 404 U.S. 244, 30 L.Ed.2d 413, 92 S.Ct. 402 (1971). The inability of a federal tribunal to review moot cases derives from the requirement of Article III of the

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privilege at a new trial. Thus, the
issue of whether or not an adverse
inference can be based on a non-party
witness' invocation of his fifth
Amendment privilege is moot. It is a
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tribunals are without power to decide
questions that cannot affect the rights
of litigants in the case before them.
North Carolina v. Rice, 404 U.S. 244, 92
L.Ed.2d 413, 92 S.Ct. 402 (1971). The
inability of a federal tribunal to
review moot cases derives from the
requirement of Article III of the

Constitution under which the exercise of judicial power depends upon the existence of a case or controversy. Liner v. Jafco, Inc., 375 U.S. 301, 11 L.Ed.2d 347, 84 S. Ct. 391 (1964); see also Powell v. McCormack, 395 U.S. 486, 23 L.Ed.2d 491, 89 S.Ct. 1944 (1966); Sibron v. New York, 392 U.S. 40, 20 L.Ed.2d 917, 88 S. Ct. 1889 (1968).

Nonetheless, Baxter, supra, makes it clear that the use of the Fifth Amendment in a civil case can be the subject of adverse inferences for consideration by the jury.

Although Lone Dog wasn't a party to this civil litigation, he was a co-conspirator with A & P Steel, Inc. If an officer of A & P Steel took the Fifth Amendment under Baxter, supra, an adverse inference could be drawn. Allowing an adverse inference when a

co-conspirator takes the Fifth Amendment doesn't significantly extend the holding in Baxter. A & P Steel has failed to show any real distinction. A & P Steel has failed to show what policy would be served by allowing an adverse inference to be drawn against the party who invokes the Fifth Amendment, but not allowing it against a co-conspirator.

The Eighth Circuit's decision doesn't conflict with Namet, supra, which deals with a criminal case.

In Baxter, supra, at 821, it states:

> "Our conclusion is consistent with the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a civil cause'. 8 J. Wigmore, Evidence 439 (McNaughton rev 1961). In criminal cases, where the stakes are higher

and the State's sole interest is to convict, Griffin prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt. Disciplinary proceedings in state prisons, however, involve the correctional process and important state interests other than conviction for crime. We decline to extend the Griffin rule to this context.

It is important to note here that the position adopted by the Court of Appeals is rooted in the Fifth Amendment and the policies which it serves. It has little to do with a fair trial and derogates rather than improves the chances for accurate decisions. Thus, aside from the privilege against compelled self-incrimination, the Court has consistently recognized that in proper circumstances silence in the face of accusation is a relevant fact not barred from evidence by the Due Process Clause. Adamson v. California, 332 U.S. 46, 91 L.Ed. 1903, 67 S.Ct. 1672, 171 A.L.R. 1223 (1947); United States ex rel Bilokumsky v. Tod, 263 U.S. 149, 153-154, 68 L. Ed. 221, 44 S.Ct. 54 (1923); Raffel v. United States, 271 U.S. 494, 70 L.Ed. 1054, 46 S.Ct. 566 (1926); Twining v. New Jersey, 211 U.S. 78, 53 L.Ed. 97, 29 S. Ct. 14 (1908). See also United States v. Hale, 422 U.S. 171, 176-177, 45 L.Ed.2d 99, 95 S.Ct. 2133 (1975); Castelum-

> Quinones v. Kennedy, 374 U.S. 469, 479, 10 L.Ed.2d 1013, 83 S.Ct. 1819 (1963); Grunewald v. United States, 353 U.S. 391, 418-424, 1 L.Ed.2d 931, 77 S.Ct. 963, 62 A.L.R.2d 1344 (1957). Indeed, as Mr. Justice Brandeis declared, speaking for a unanimous court in the Tod case, supra, which involved a deportation: 'Silence is often evidence of the most persuasive character.' 263 U.S., at 153-154, 68 L.Ed. 221, 44 S.Ct. 54. And just last Term in Hale, supra, the Court recognized that '[f]ailure to contest an assertion . . . is considered evidence of acquiescence . . . if it would have been natural under the circumstances to object to the assertion in question.' 422 U.S., at 176, 45 L.Ed.2d 99, 95 S.Ct. 2133."

The Eighth Circuit's decision does not conflict with the decisions of this Court; nor are there any conflicts among the circuits. The issue is narrow and unique to its facts. The decision is correct and reasonable.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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